FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960.

No. 251

RUSSELL BUFALINO,

Petitioner,

v.

JOHN W. HOLLAND, District Director of Immigration and Naturalization.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEON H. KLINE,
1220 Philadelphia Saving Fund Bldg.,
Philadelphia 7, Penna.,
Counsel for the Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

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No.

RUSSELL BUFALINO,

Petitioner,

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Russell Bufalino, petitioner herein, prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on April 1, 1960.

OPINIONS BELOW.

The Findings of the Special Inquiry Officer, the Opinion of the Board of Immigration Appeals, and the Opinion of the District Court [1] are not reported. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 1a, is reported at 277 F. 2d 270.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, hereto, *infra*, p. 21a) was entered on April 1, 1960. A timely petition for rehearing was denied on April 27, 1960 (Appendix C hereto, *infra*, p. 22a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

1. These are contained in the "Appellant's Appendix", printed for use in the Court below, copies of which are filed in this Court pursuant to Rules 21(4) and 23(1)(i) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Is an alien lawfully admitted for permanent residence who omitted to give notice of his address pursuant to Section 265 of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1305, deportable pursuant to Section 241(a)(5) of that Act, 8 U. S. C. Section 1251(a)(5) where no finding has been made that he has failed to establish that such omission was the result of a specific wrongful intent?

2. Where an alien, who was lawfully admitted for permanent residence, who has resided in the United States for over fifty years and who is the spouse of a United States citizen, after a fishing trip to Cuba and Bimini reentered as a citizen in 1956, without documents which in any event must be granted to him under the law, do not the provisions of Section 7 of the Act of September 11, 1957, 71 Stat. 640, 8 U. S. C. Section 1251(a), applied to prevent deportation under Section (a)(1) and (2) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1251(a)(1) and (2)?

3. Is an alien unworthy of the benefit of discretionary relief because during a Congressional investigation he invoked the Fifth Amendment?

4. Was relief from deportation otherwise denied on proper legal grounds?

STATUTES AND REGULATIONS INVOLVED.

Immigration and Nationality Act of 1952, Section 211 (a) and (b) [66 Stat. 181, 8 U. S. C. § 1181(a) and (b)]; Section 212(a)(20) and (c) [66 Stat. 182, 8 U. S. C. § 1182 (a)(20) and (c)]; Section 241(a)(1), (2) and (5) [66 Stat. 204, 8 U. S. C. § 1251(a)(1), (2) and (5)]; Section 244(a)(5) and (e) [66 Stat. 214, 8 U. S. C. § 1254(a)(5) and (e)]; Section 265 [66 Stat. 225, 8 U. S. C. § 1305]; Section 266(b) [66 Stat. 225, 8 U. S. C. § 1306(b)]; Section 7 of the Act of September 11, 1957, 71 Stat. 640, 8 U. S. C. § 1251a; 8 C. F. R. (1958) Sections 242.7a, 264.1(c)(1). These are set out in Appendix D hereto, *infra*, p. 23a.

STATEMENT OF THE CASE.

On December 16, 1957, the Immigration and Naturalization Service ordered petitioner to show cause why he should not be deported (1) under Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1251(a)(2) on the ground that he entered the United States without inspection at Miami, Florida, on April 30, 1956 and at New York City, New York, on May 5, 1956 after a brief fishing trip to Cuba and Bimini, and (2) under Section 241(a)(5) of that Act, 8 U. S. C. Section 1251(a)(5) on the ground that he failed to furnish his address in January 1956 and January 1957 pursuant to Section 265 of that Act, 8 U. S. C. Section 1305. At the time of the hearing before the Special Inquiry Officer on the above charges, a third charge was asserted under Section 241(a)(1) of that Act, 8 U. S. C. Section 1251(a)(1) that at the times of his reentries petitioner was excludable because he did not possess a valid entry document.

Petitioner had reentered the United States representing himself as a citizen of the United States, and in fact had always regarded himself as a natural citizen, and this accounted for his failure to give the notice required by Section 265 in 1956 and 1957.

The Service, however, produced evidence to show that petitioner was born at Montedoro, Italy, on September 23, 1903; that he first entered the United States on December 23, 1903, at the age of two months; that he was taken back to Italy that winter and next entered the United States on January 13, 1906, at the age of two years; that he was taken back to Italy in the fall of 1910, and reentered the United States on February 15, 1914, at the age of ten. Thereafter, he resided in the United States continuously except for the fishing trip to Cuba and Bimini (and several unspecified trips to Canada). Petitioner reentered the United States on these occasions as a citizen in the bona fide belief he was born here.

In an attempt to show knowledge on the part of petitioner of his Italian birth, the Service relied principally on school records when petitioner was 6, 10, 12 and 14 years of age. The only documentary evidence in petitioner's adult years is secondary in nature and consists of an accident report filed by an employer involving a workman's compensation claim in 1944 in which petitioner's nationality is shown as Italian.

Petitioner's sisters; three and seven years older than petitioner (called as witnesses by the Service), had no personal knowledge as to where the petitioner was born, but both thought he was born in the United States. Petitioner's brother (also called as a witness by the Service) had no personal knowledge as to petitioner's place of birth. Petitioner himself testified he did not know that he was born in Italy, and always believed he was born in the United States. Petitioner was largely left on his own because his father died in the United States in 1904 shortly after petitioner was born, and his mother died in the United States in 1910. It appears he shunted among family and friends. Although petitioner had actually been in the United States in his very early years, on his third trip here, at the age of ten, he spoke practically no English.

In support of his belief of his birth in the United States, there is evidence that petitioner voted in Buffalo since 1925 or 1927 when he was in his early twenties, and gave his place of birth as Pittston, Pennsylvania, although in one voting registration his place of birth appears to be Buffalo, New York, the respondent claiming that he did not supply that information regarding his place of birth. In his application for a marriage license on August 9, 1928, his place of birth is shown as Pittston, Pennsylvania and the same information is given in his application for membership in the Elk's Lodge in the same year. There are variations in the actual date of birth, but the respondent testified that he never knew his actual date of birth and that he merely adopted one as a matter of convenience. These documents, which are between 20 and 30 years old, show the respond-

ent's place of birth as in the United States. In addition, the respondent registered for the military service as American-born, when registration was first required, has never attempted to apply for naturalization even though there appears to have been no obstacle to his naturalization, and testified that he always reentered the United States in the belief that he was born in this country and was a citizen.

The Special Inquiry Officer nevertheless disbelieved petitioner and concluded that he had known since he was old enough to understand that he was born in Italy. The Special Inquiry Officer stated that since he found this portion of petitioner's testimony false, he further found that petitioner's failure to furnish the notice of address required by Section 265 was not reasonably excusable and was willful. The Special Inquiry Officer further concluded that since petitioner lacked proper documentation at the times of his reentries in 1956, i.e., a Form I-151 card received by all aliens who register pursuant to Section 265 (as provided by 8 C. F. R. 264.1(e)(1)), he was not "otherwise admissible", and hence Section 7 of the Act of September 11, 1957, 8 U. S. C. Section 1251a was inapplicable. The Special Inquiry Officer refused to accede to requested waiver of documentation only because petitioner had reentered upon the representation that he was a citizen. In sustaining the Special Inquiry Officer, the Board of Immigration Appeals recognized that documentary inadmissibility was waivable pursuant to Section 211(b) of the Immigration and Nationality Act, 8 U. S. C. Section 1181(b). Both the Special Inquiry Officer and the Board of Immigration Appeals denied petitioner's application for voluntary departure with preexamination under Section 244 of the Immigration and Nationality Act, 8 U. S. C. Section 1254(e), since he did not, indeed could not, have ten years' residence following his reentry in 1956.

The Special Inquiry Officer and the Board of Immigration Appeals gave particular weight to the fact that petitioner had been summoned to appear in January, 1958,

before the Legislative Committee of the State of New York on Government Operations and also before a federal grand jury at New York City when he declined to answer some questions, invoking the Fifth Amendment. Although the Special Inquiry Officer found specifically that petitioner was not a "mobster", the Board of Immigration Appeals said it was "not impressed" with the fact that in the instant proceedings petitioner answered the questions which had previously been put to him in the Legislative Committee meeting. The Board concluded that petitioner's application of the Fifth Amendment connotes that he lacked the attributes of a desirable resident and that he is not a person whose presence in the United States should be readjusted under the discretionary powers vested in the Attorney General. On this basis, it was concluded that petitioner failed to show "good moral character."

The District Court (Welsh, J.) granted a motion for summary judgment against petitioner. In so doing, that Court emphasized the fact that petitioner had used the Fifth Amendment before a legislative body, and concluded that he therefore lacked attributes of a desirable resident and is not a person whose presence in the United States should be adjusted under discretionary powers.

The Court of Appeals affirmed. Essentially, that Court followed the decision of the Board of Immigration Appeals. However, in sustaining the inapplicability of Section 7 of the Act of September 11, 1957, and the refusal to waive lack of documentation, the Court of Appeals relied upon 8 C. F. R. Section 242.7a, relating to waiver of documentation, which was not in effect at the time the application for waiver was made and ruled upon. The regulation adds requirements which did not previously appear.

A timely petition for rehearing was filed in the Court of Appeals and was denied.

REASONS FOR GRANTING THE WRIT.

This Court has said that although not penal in character, deportation statutes as a practical matter may inflict the equivalent of banishment, and should be strictly construed. *Barber v. Gonzales*, 347 U. S. 637, 642-643 (1954). The issues raised herein are of substantial importance to the petitioner. They are also of substantial importance to the proper construction and administration of the immigration laws generally. The issues raised have in the main not previously been the subject of judicial decision in the context here presented, and unless this Court acts to review the determinations below, not only will the petitioner be banished after almost a half century of residence in the United States, but the general application of the immigrations laws will be significantly affected.

1. A critical factor in this deportation proceeding is the asserted failure of petitioner to show that his omission to give the notice of his address in January, 1956 and January, 1957, required by Section 265, was reasonably excusable or not willful. The Courts below affirmed the administrative findings that petitioner's omission was willful, thus rendering him deportable under Section 241(a)(5).

It is pointed out that under Section 266(b) failure to give the notice required by Section 265 is a misdemeanor. It further provides that irrespective of conviction and punishment on such account, an alien who fails to give the required notice shall be deported unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful. This provision is the counterpart of Section 241(a)(5), a section treating with deportable aliens.

The statutory scheme clearly emphasizes that the term "willful" is used in the traditional sense and involves a

specific wrongful intent, born of bad purpose and evil motive, to violate the Act.

Neither, on the administrative nor on the judicial level below was attention given to the legal content of the term "willful" as used in the applicable statutes. However, the Special Inquiry Officer and the Board of Immigration Appeals expressly based the conclusion of willfulness directly upon the Special Inquiry Officer's conviction that petitioner had known since he was old enough to understand that he was born in Italy.

Although petitioner has the burden of proving absence of willfulness, it is readily apparent that there is a substantially greater difficulty in negating mere knowledge than in negating specific wrongful intent evilly motivated.

The credible evidence offered by petitioner, i.e., the undenied and undeniable documentary evidence, establishes that the claim to native citizenship was not a conveniently assumed cloak, but one which petitioner, *arguendo* knowingly, had donned almost a half century ago, hardly in anticipation of Section 265. Except in petitioner's very early school years, all the documentary evidence shows that petitioner claimed citizenship by birth: in his application for marriage license in 1928, in his registration for Social Security in 1939, and his registration for military service between 1940 and 1942. In addition, petitioner testified that the reason he failed to register as an alien and give the required notices of his address was that he believed himself to be a native born citizen. At the very least it can be said in petitioner's favor that he made three crossings from Italy to the United States between 1903 and 1914, at the ages of two months, two years and eleven years respectively; his father died in the United States in 1904 and his mother in 1910; his family was separated, and petitioner was left on his own to a large extent, with no ability at English upon his last arrival in 1914. It is understandable, therefore, that petitioner did not know his date of birth, and adopted one arbitrarily and that he should assume native citizenship.

Petitioner's failure to give notice of his address was not the result of a wrongful intent to avoid the Act, and this would be true even if his assumption of citizenship forty years or more ago was known to him to be indefensible.

It is respectfully submitted that there is ample evidence in the record to convince the Attorney General that petitioner did not "willfully" fail to give the notice required in Section 265, when that term is read with its proper legal meaning. The net effect of the statutory construction assumed below was to increase his burden of proof and to eliminate from consideration substantial relevant evidence

2. Below, it was further held that petitioner was deportable under Section 241(a)(1) and (2) on the grounds that he entered in April and May of 1956 without inspection and without a valid entry document. In this connection, it is undisputed that the only entry document required by petitioner at the time of his reentries was a Form I-151 card received by all aliens who register pursuant to Section 265.[2]

It was and is the position of petitioner that he is saved from deportation on this ground by Section 7 of the Act of September 11, 1957. That Act states that the provisions of Section 241 relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured documentation, or entry into the United States by fraud or misrepresentation, shall not apply to an alien otherwise admissible at the time of entry who is the spouse of a citizen. It is undisputed that petitioner's wife was and is a citizen.

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2. This results from 8 C. F. R. Section 211.12 as then effective which provided that immigrants lawfully admitted for permanent residence returning from a temporary absence of not more than six months in places named in Section 101(b)(5) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1101(b)(5), among which are Cuba and the Bahamas, need not present visas or passports, but a Form I-151 duly issued.

The Special Inquiry Officer and the Board of Immigration Appeals held that this Act was inapplicable, since petitioner was "otherwise inadmissible" under Section 212(a)(20) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1182(a)(20) in that he was not in possession of a proper entry document. While in the discretion of the Attorney General, the documentary inadmissibility may be waived by the Attorney General, pursuant to Section 211(b) of the Immigration and Nationality Act of 1952, Section 1181(b), the Special Inquiry Officer refused such waiver because petitioner procured his entry by fraud, while the Board concluded that the circumstances did not call for the exercise of this discretion in favor of petitioner.

Petitioner respectfully submits that Section 7 of the Act of September 11, 1957, has been misconstrued and its purposes frustrated by the determination below.

First, if petitioner's entry was fraudulent through the misrepresentation that he was a citizen, then his lack of documentation was a part of and grew out of the fraud, and consequently petitioner is saved from deportation on this ground by Section 7.

Second, in any event, the refusal to waive documentation on the ground that the entry was accomplished by fraud is untenable where the statute itself has as its purpose forgiveness of the fraud: i.e., the first sentence of Section 7 removed the illegal entries as a ground of deportability. Indeed in *Matter of Y—*, A-7205042, B. I. A. Interim Decision No. 975 (February 2, 1959), the Board stated that the intent of Congress was clearly to save from deportation those who were admissible except for the entry by fraud or misrepresentation, and the fact that the misrepresentation may give rise to a ground of deportation such as lack of documentation or entry without inspection does not change the basic fact that entry was procured by fraud. Section 7 is remedial legislation intended on its face to prevent family separation. The view now adopted below ignores its substance.

Third, it is emphasized that in the instant case no discretion was reposed in the Attorney General to withhold the required documentation (Form I-151) from petitioner, for petitioner was entitled to it as a matter of right. *United States v. Ginn*, 222 F. 2d 289 (3d Cir. 1955). (Indeed, promptly upon becoming aware of his status as a non-citizen petitioner did in fact register.) It is anomalous to refuse to waive an entry document in the light of Section 7 when the document could not have been refused in any event.

Fourth, although the subject of waiver of inadmissibility was treated below, consideration was limited to Section 211(b). However, no consideration was given to 212(c) of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1182(c). It is notable at the very least that this provision gives weight to an additional qualification petitioner fulfills, i.e., he was returning to a lawful unrelinquished domicile of seven consecutive years. Since Congress singled out this qualification, as a basis for relief from Section 212(a)(20), the failure below to give the statute its full due is a plain error in the exercise of any discretion committed to the Attorney General.

Fifth, the Court of Appeals sustained the refusal of waiver upon 8 C. F. R. Section 242.7a (23 F. R. 2787, April 26, 1958). This regulation further restricts waiver of documentation by adding a requirement that the alien "is not otherwise subject to deportation." Since below it was erroneously determined that petitioner was deportable, as previously shown, the Court of Appeals concluded that petitioner was inadmissible notwithstanding Section 7 of the Act of September 11, 1957. The Court of Appeals failed to observe, however, that this regulation was not in effect at the time petitioner's cause was determined by the Special Inquiry Officer, and that it added a condition which did not previously appear. Moreover, it must be noted that the Immigration and Nationality Act of 1952 draws a clear distinction between admissibility and deportability. Therefore, the inclusion of deportability as a ground for denial of

waiver of documentation for admissibility is an unwarranted exercise of discretion on the part of the Attorney General.

3. The Board of Immigration Appeals, and the District Court gave consideration to the fact that petitioner had been subpoenaed to appear before the Joint Legislative Committee of the State of New York on Government Operations on January 9, 1958, and appeared before a Federal Grand Jury in New York City on January 7, 1958. On both occasions he invoked his constitutional right under the Fifth Amendment to decline to answer certain questions put to him. However, at the hearings in this deportation proceeding, petitioner answered the same questions he had previously refused to answer.

The Board of Immigration Appeals expressly declared that it was not impressed by this effort on the part of petitioner, which in effect avoided any analogy to *Kimm v. Rosenberg*, — U. S. —, 4 L. Ed. 2d 1299 (1960). The Board concluded that invocation of the Fifth Amendment as aforesaid by the petitioner "connotes that he is lacking in the attributes of a desirable resident and that he is not a person whose presence in the United States should be adjusted under the discretionary powers vested in the Attorney General." This statement was echoed by the District Court.

Petitioner submits that this statement is flagrantly repugnant to the Fifth Amendment. It flies in the face of constitutional principles long recognized and applied with unrelenting vigor by this Court. Cf. *Slochower v. Board of Higher Education*, 350 U. S. 351 (1956); and also, *United States ex rel. Beltrage v. Shaughnessy*, 212 F. 2d 128, 130 (2d Cir. 1954). It represents a state of mind unconstitutionally arbitrary and unreasonable. The Court of Appeals did not meet this issue four-square: it was satisfied with the blithe assertion that "the comments were not prejudicial." But this is manifestly unsupportable in view of the straightforward confession of the administrative agency that its judgment in this case in exercising the discretionary powers vested in the Attorney General took into considera-

tion and was influenced by this unwarranted inference of unfitness and lack of morality. We have here confessed abdication of the administrative discretionary function in favor of an arbitrary *per se* rule infecting the entire proceeding against petitioner. It is respectfully submitted that the administrative agency has pronounced and applied a general principle which our Constitution forbids, and this Court cannot and will not permit to stand.

4. Petitioner sought pre-examination, waiver of inadmissibility and voluntary departure under the second sentence of Section 7 of the Act of September 11, 1957. Relief was denied upon the ground that petitioner was not eligible for voluntary departure under Section 244(e), which requires five years of good moral conduct preceding the application, since that section incorporates Section 244(a)(5) in toto, which establishes ten years of continued physical presence *and* good moral conduct subsequent to the date upon which the ground of deportation incurred as prerequisite to suspension of deportation. Petitioner submits that Section 244 is irrelevant to the relief contemplated by Section 7 of the Act of September 11, 1957. But even if this were not so, it is plain that the view of the interplay between (a)(5) and (e) of Section 244 adopted below renders the provisions of (e) meaningless. It is submitted that the only reasonable interpretation of Section 244(e) is that for the purposes of voluntary departure the requirement is five years of good moral conduct preceding the application for voluntary departure. It is also pertinent to note that the Board of Immigration Appeals denied this discretionary relief, as it denied the discretionary waiver of documents under Section 211(b), upon the illegal inferences it drew from petitioner's exercise of his rights under the Fifth Amendment, above discussed.

5. Petitioner further submits that the assertions below that he gave false testimony and that he failed to show good moral conduct, are not founded upon substantial,

probative evidence. Petitioner was first brought to the United States at the age of two months. His father died shortly thereafter and he was taken back to Italy, to return here at the age of two years. His mother died here in 1910. He was then taken back to Italy and returned here in 1914 at the age of eleven. He could not then speak English. Petitioner testified he believed he was born here, and for this reason did not register as an alien. His conduct here was wholly consistent with this belief, and his marriage record in 1928 as well as his Social Security and Selective Service records show this to be so. To conclude that petitioner lied, the Special Inquiry Officer depended entirely upon petitioner's very early school records, although these were not properly admissible nor properly authenticated. More important, there was no evidence whatsoever to indicate that the information for these records was supplied by petitioner. Members of petitioner's family were called by the Service as witnesses: they had little to offer; one could not remember the date of his mother's death. The Special Inquiry Officer held this against petitioner, even though his disbelieving these witnesses could not establish the contrary conclusion that petitioner's testimony was false. No allowance was made below for the fact that this was an inquiry into human minds as to matters that occurred over a half century ago, when petitioner and his brother and sisters were mere children.

The assertion below that petitioner failed to show good moral character is not predicated upon any valid ground. Petitioner's record in this country for almost a half century is clear and clean. The Special Inquiry Officer purported to find falsity in petitioner's testimony here in relation to his earnings, but neglected to note that wherever possible such discrepancies as may have appeared were set to right by petitioner in these proceedings.

In all, it clearly appears, as stated by the Board of Immigration Appeals, that the administrative approach to petitioner and his status was affected and controlled by his

invocation of the Fifth Amendment before other bodies. It was upon this ground that the Board expressly based its determination that petitioner should be deported. This is a result unfounded upon the record and intolerable under the law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LEON H. KLINE,
Counsel for the Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,927

RUSSELL BUFALINO,
Appellant

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 1, 1960

Before GOODRICH, HASTIE and FORMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed April 1, 1960)

By FORMAN, *Circuit Judge*.

On December 16, 1957, the Immigration and Naturalization Service (hereinafter called the Service) ordered the appellant Russell Bufalino to show cause why he should not

be deported (1) under 8 U.S.C. § 1251(a)(2)[1] on the ground that he re-entered the United States without inspection at Miami, Florida, on April 30, 1956 and at New York, New York, on May 5, 1956, after brief sojourns in Cuba and Bimini respectively, and (2) under 8 U.S.C. § 1251(a)(5)[2] in that he failed to register with the Attorney General of the United States in January 1956 and January 1957, as required by 8 U.S.C. § 1305.[3] It is represented that on each re-entry he stated that he was a citizen of the United States.

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1. "§ 1251. Deportable aliens. General classes.

"(a) Any alien in the United States (including alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

"(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;"

2. "§ 1251.

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

"(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 1306(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of sections 611-621 of Title 22 or has been convicted under section 1546 of Title 18;"

3. "§ 1305. Change of address.

"Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. Any such alien who is temporarily absent from the United States on the first day of January following the effective date of this chapter, or on the first day of January of any succeeding year shall furnish his current

During his hearing before a Special Inquiry Officer a third charge was lodged against him under 8 U.S.C. § 1251 (a)(1)[4] viz., that at the time of the above alleged illegal entries he was excludable because he did not possess a valid visa or other entry document.

The appellant contested only the second of these charges and asserted that his failure to register with the Attorney General in January 1956 and 1957 was "reasonably excusable and was not willful." His application for termination of the proceedings pursuant to 8 U.S.C. § 1251a or, alternatively, for voluntary departure and preexamination under 8 U.S.C. § 1254(e) and 8 C.F.R. 235a.1 with advance waiver of excludability under 8 U.S.C. § 1251(a) was denied by the Special Inquiry Officer who found the appellant deportable on all three charges.

An appeal was taken to the Board of Immigration Appeals which affirmed the findings and conclusions of the Special Inquiry Officer.[5] Review of the order for deportation and denial of relief was then sought before the District Court for the Eastern District of Pennsylvania which

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address and other information as required by this section within ten days after his return. Any such alien in the United States in a lawful temporary residence status shall in like manner also notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States regardless of whether there has been any change of address. In the case of an alien for whom a parent or legal guardian is required to apply for registration, the notice required by this section shall be given by such parent or legal guardian."

4. "§ 1251

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

5. The first decision of the Board of Immigration Appeals of August 6, 1958 was reviewed by the Attorney General who remanded the case to the Board by his opinion and order of August 18, 1958. The final decision of the Board was rendered on September 2, 1958.

granted a motion for summary judgment in favor of the District Director of Immigration and Naturalization, the respondent in this proceeding, and dismissed the petition for review.

On appeal from that judgment the appellant contends, as he did before the Special Inquiry Officer, that his failure to provide the Attorney General with his address and other information as required by 8 U.S.C. § 1305 "was reasonably excusable and was not willful", because until the inception of these proceedings he had always thought Pittston, Pennsylvania his birthplace and that therefore he is not deportable under 8 U.S.C. § 1251(a)(5).

The evidence introduced before the Special Inquiry Officer on this issue consisted, in part, of appellant's school records. The record of a New York City school for 1910 shows his birth date as September 27, 1903 and that he was removing to Pittston, Pennsylvania; the record for 1914 shows his age to be ten years but no birth date is given; for 1915 only 1903 and 12 years of age are stated; and for 1917, October 29, 1903 and 14 years are given. All these records show Italy as appellant's birthplace.

The Service also submitted a workmen's compensation report which was filed in 1944 by the president of a company by which appellant was then employed. The report shows the appellant's nationality as Italian. Although he did not make this report he testified to the close friendship which existed between the president of the company and himself.

Appellant's voting registration for 1947 in Pittsburgh, Pennsylvania, gives his birthplace as Buffalo, New York and the date as November 29, 1905. Appellant denies that he supplied this information. He testified that when he registered to vote in Buffalo in 1925 or 1927 he gave his birthplace as Pittston, Pennsylvania.

His applications for a marriage license dated August 9, 1928 and for membership in the Elks Lodge in 1929, showed Pittston as his birthplace. The dates shown are September

29, 1904 and October 29, 1904. His social security and selective service registrations show the same place of birth. Both give his birth date as October 29, 1903.

Appellant's birth certificate is part of this record. It shows that he was born in Montedoro, Italy on September 29, 1903. Its correctness has been conceded by the appellant.

Oral testimony as to the date and place of birth of the appellant was offered by his wife, brother and two sisters. Carmella (Caroline) Sciandra Bufalino, his wife, could only say that she had always heard that he was born in Pittston, Pennsylvania on October 29, 1903.

Each of his siblings testified to having been born in Montedoro, Italy. His brother Calogero, or Charles, gave his date of birth as October 15, 1898. He did not know where the appellant was born. He could only remember the appellant in Pittston, Pennsylvania.

A sister, Cristina Teresina Cammella, testified that she was born on December 4, 1900 and had always heard that the appellant was born in Pittston, Pennsylvania on November 29th. She failed to give any year of birth.

The other sister, Josephine Bufalino Cordaro, stated her birth date to be February 7, 1897, making her, she thought, seven years senior to the appellant. She testified that to the best of her knowledge he was born in Pittston, Pennsylvania in the fall of 1903 or 1904.

She also stated that she came to this country in 1902 or 1903 accompanied by her parents, sister and brother Calogero;[6] that her father died in 1904;[7] that thereafter her mother took all four children back to Italy; that about a year later [January 13, 1906] she returned to this country

6. Exhibit 21 is a certified copy of a manifest record of appellant's entry into the United States at New York, New York on December 21, 1903. It shows that he was two months of age and was accompanied by his mother, two sisters and a brother, all of whom were destined to Angelo Bufalino, husband and father in Pittston, Pennsylvania.

7. Her sister testified that their father died on September 23, 1904, according to the markings on his tombstone in Pittston.

with her mother and two brothers, leaving her sister in Italy; that after her mother died in 1910 she and the appellant returned to Italy from which they and their sister returned to the United States in 1914. The witness, also related that after her marriage in Buffalo, New York, on March 18, 1914, the appellant lived at her house while attending school. She stated that she did not enroll him and that he must have enrolled himself.

In essence this witness testified that when she was almost seven years of age she and her family came to this country without appellant; that shortly after her father's death, known to have occurred nine months later, the family including the appellant returned to Italy.

In testifying that the appellant did not accompany her on her first trip from Italy to the United States in 1903 but did make the return trip after the death of their father, this witness is saying that the appellant was born in Pittston. It is now undisputed that, in fact, the appellant was born on September 29, 1903 in Montedoro, Italy, and arrived in New York on December 21, 1903, together with this witness, their mother, brother and sister.

Having heard and observed the appellant's wife, brother and sisters, the Special Inquiry Officer was "not convinced that these persons testified truthfully concerning their information and belief, and the reputation in the family, as to the place of [appellant's] birth." The record provides ample justification for this conclusion.

Nor was the information contained in the affidavit of Calogero Bufalino, an uncle of the appellant, born in Montedoro, Italy, on April 5, 1878, any more reliable. He deposed as follows:

> "* * * The fourth child, Rosario [Russell] Bufalino, was not born until after Cristina [the appellant's mother] left Montedoro for the United States. Your affiant further avers that his brother Angelo left Montedoro sometime early in the year 1903, at which time

> Cristina, his wife remained in Montedoro with the three children and at that time being pregnant. Your affiant further avers that he arrived in the United States on March 15, 1904 on the S. S. North America and immediately upon his landing in New York came to Pittston. Your affiant further avers that when the said Cristina Bufalino left Italy some six or eight months before he did, she was pregnant. . . ."

In the light of the appellant's birth certificate the recollection of this deponent is inaccurate.

The appellant has attacked the introduction in evidence of the records referred to earlier. He contends that they fail to meet the requirements of judicial admissibility. But it is not necessary that they do so for they were admitted not in a judicial but in an administrative proceeding where the more strict rules of evidence do not obtain. Navarette-Navarette v. Landon, 223 F. 2d 234, 237 (9 Cir. 1955). See also Marcello v. Ahrens, 212 F. 2d 830, 837 (5 Cir. 1954), affirmed sub nom. Marcello v. Bonds, 349 U. S. 302 (1955).

During the course of the hearing the appellant filed his application for preexamination (Exhibit 35). He answered Item 14 as follows:

> "During the past five years I have been employed by the following named persons or firms (If self employed, give nature of business):

Name and Address of Employer	*Type of Work & Salary*	*From*	*To*
Bonnie Stewart	Efficiency Man $200 per wk.	1950	1953
Penn Drape Co.	Self Employed	Dec. 1953	To Date"
Fairfax, Inc.	Efficiency Man $125 per wk.	Dec. 1953	To Date"

The information given by the appellant in answer to this question was inaccurate and lacked required honesty and frankness. Instead of a direct answer to this simple inquiry the sum total of appellant's contradictory and confused testimony elicited on lengthy cross-examination demonstrated that he had many other employment associations and income producing connections concerning which his testimony was intentionally and purposefully vague and uninformative.

The appellant undertook to prove himself a person of good moral character and introduced 13 witnesses and 161 affidavits to this end. The affidavits were on printed forms with blank spaces for the insertion of the deponent's business, number of years so engaged, nature of relationship with the appellant and the duration thereof. Except that those affidavits executed by naturalized citizens also provided space for the date and place of naturalization and deponent's certificate number, the affidavits as printed were identical.

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8. "COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF LUZERNE } *ss.:*

AFFIDAVIT

being duly sworn by law, deposes and says that he was born on the day of in
That he presently resides at
Your affiant further avers that he has known Russell Bufalino since years, and has been closely associated with him in , and through all of these years, he has known the said Russell Bufalino to be a person of high moral character, an outstanding citizen of the Commonwealth and a person of good repute. Your affiant further avers that he has never heard anything detrimental about the said Russell Bufalino from any of the persons that he knows who also know the aforementioned Russell Bufalino. Your affiant further avers that he is engaged in the business of and has been for the last years.

Sworn to and subscribed
before me this day
of , 1958.

The appellant argued that it was an abuse of discretion to find that he had failed to show that he was a person of good moral character in the light of this volume of uncontradicted testimonials. The introduction of even as many as 161 affidavits and the oral testimony of 13 witnesses does not necessarily result in the establishment of good moral character. The Special Inquiry Officer was free to consider both the witnesses and the affidavits in terms of the association or knowledge upon which they testified or were based and to weigh this evidence together with all the other evidence in the case before him. He found that some of the affidavits were based upon a "nodding acquaintanceship" with the appellant rather than on close association and that some of the affiants had not seen him for protracted periods of time. He was within his province in determining that the appellant's evidence, large in volume though it was, did not overcome the unfavorable aspects of other evidence in the case against the appellant.

In addition to the foregoing the Special Inquiry Officer found that the appellant gave false testimony in these proceedings with regard to "his business connections and income, as to his belief relative to his place of birth, as to his adoption of a specific birth date, and as to his absences from the United States." Title 8 U. S. C. § 1101(f)(6) [9] provides that an alien who testifies falsely to procure benefits under the immigration and nationality laws is estopped from demonstrating himself to be a person of good moral character. Therefore, having determined that the appellant testified falsely in these proceedings in order to avoid deportation the Special Inquiry Officer was required by this

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9. "(f) For the purposes of this chapter—

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was——

* * * * *

"(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter."

section to find that the appellant was not a person of good moral character.

An attempt was made to register the birth of the appellant as having occurred at Pittston, Pennsylvania on October 29, 1903 in the records of the Clerk of the Orphans' Court of Luzerne County, Pennsylvania. Following is an extract from the findings of the Special Inquiry Officer in this regard:

> "Exhibit 5 is a copy of a petition signed by Ettore Agolino as attorney for respondent. It is addressed to the Orphans Court of Luzerne County, Pennsylvania, and relates that the birth of respondent is recorded in the office of the Clerk, Orphans Court, in Birth Register Book, Volume 3, Page 52, as having occurred on October 29, 1903, at Pittston, Pennsylvania. The petition goes on to say *that a birth certificate is essential to petitioner in proceedings brought against him by the Immigration and Naturalization Service*, and that the petitioner prays the court to grant a rule to show cause why the order of the court impounding the aforesaid record should not be revoked and a birth certificate issued. This document also contains *an affidavit of respondent in which he deposes that the facts contained in the within petition are true and correct, to the best of his knowledge, information and belief*. The date of the filing of this petition is not shown but the document is shown to have been notarized on January 10, 1958. The same exhibit includes an order of the court on January 14, 1958, setting a hearing for February 7, 1958. Counsel for respondent stated on the record (p. 10) that the petition described above was filed on January 14, 1958. Counsel stated on the record (p. R-184) that the President Judge of the Orphans Court, Luzerne County, expunged the record of respondent's birth from the birth record book, acting upon the petition of counsel. *In his earlier testimony, at Page 189,*

respondent stated that he had never made an application for a birth certificate in Luzerne County; that he had once inquired of his counsel if there is any way of getting a birth certificate; that his counsel said, 'I will get you affidavits when you are ready and we will do that'; and that this was 'years ago'." (Emphasis supplied.)

There can be no doubt that there was inserted in the records of Luzerne County, Pennsylvania a false entry of his birth place as Pittston, Pennsylvania and the date as October 29, 1903, which, undetected, could have been the foundation for the issuance to the appellant of a fictitious birth certificate. The circumstances of the patently false entry was called to the attention of the Orphans' Court of Luzerne County which issued an order impounding that record. While appellant disclaims all knowledge of the falsity of the entry—who else but he had a motive to design this deception? His denial stretches credulity to the breaking point.

In partial summary of his findings the Special Inquiry Officer said:

> "Respondent's testimony as to his business connections and income, as to his belief relative to his place of birth, as to his adoption of a specific birth date, and as to his absences from the United States is contradicted, time and again by respondent's own testimony or by other evidence of record. I am convinced that in all these matters, respondent knowingly and deliberately told less than the truth. His assertions that prior to these proceedings he had no knowledge of the false birth record, which had been created in his name in the Luzerne County records, is, in my view, devoid of plausibility. From my observation of respondent's demeanor and upon appraisal of all his testimony, it is my finding that his claim that prior to January 20, 1958, he had always believed that he was

born in Pittston, Pennsylvania, is unworthy of credence, and was, indeed, offered by respondent in these proceedings with full knowledge of its falsity. In the light of the early school records, I am convinced that the truth of the matter is that respondent, from the time he was old enough to understand, always knew that he was born in Italy. Since I find this portion of his testimony to be false, I further find that he has failed to establish that his failure to furnish the information required by Section 265 of the Immigration and Nationality Act was reasonably excusable or was not wilful. . . ."

Accordingly, the Special Inquiry Officer, affirmed by the Board of Immigration Appeals, found that the appellant's admitted failure to notify the Attorney General of his address or other information in compliance with 8 U. S. C. § 1305 in 1956 and 1957 was not reasonably excusable, was willful, and rendered him deportable under 8 U. S. C. § 1251(a)(5). Appreciating that this officer had the benefit of appraising the credibility of the appellant and the witnesses as they appeared before him, and having considered the record we are not disposed to disturb the district court's acceptance of that determination.

The appellant next contends that the Attorney General abused his discretion in not granting him a waiver of excludability as provided in Section 7 of the Act of September 11, 1957 (71 Stat. 640), 8 U. S. C. § 1251a.[10] Simply stated

10. "§ 1251a. Aliens deportable for fraud or misrepresentation; adjustment of status of certain aliens; conditions; waiver of ground of inadmissibility.

"The provisions of section 1251 of this title relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien

and as applicable to this appellant that section provides that an alien who entered this country by fraud or misrepresentation or without proper documentation and who would, therefore, be subject to deportation under § 1251, may be saved from the application of that section by the exercise of discretion on the part of the Attorney General providing the alien is both the spouse of an American citizen and otherwise admissible.

The appellant comes within the terms of § 1251a to the extent that he is one who has entered the country by fraud and is married to an American citizen. Whether he was "otherwise admissible at the time of entry" as required is another question.

Appellant contends that if he was *not* otherwise admissible it was only because when he re-entered the United States in April and May of 1956 he lacked proper documentation, i.e. Form I-151, a card [11] received by all aliens who regiser pursuant to 8 U. S. C. § 1305. He submits that

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lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided*, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. After September 11, 1957, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, shall on and after September 11, 1957, be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States."

11. It also serves as evidence of an alien's lawful admission to the United States. 8 C. F. R. 264.1(c)(1).

this deficiency may be waived under 8 C. F. R. § 242.7a which reads:

> "§ 242.7a. Waiver of documents; returning residents. Pursuant to the authority contained in section 211 (b) of the act, an alien previously lawfully admitted to the United States for permanent residence, who, upon return from a temporary absence of less than one year in a country or countries of the Western Hemisphere, was excludable because of failure to have or to present a valid passport, immigrant visa, reentry permit, border crossing card, or other document required at the time of entry, may be granted a waiver of such requirement in the discretion of the district director, or in deportation proceedings in the discretion of the special inquiry officer: *Provided*, That such alien (a) was not otherwise excludable at the time of entry, or (b) having been otherwise excludable at the time of entry is with respect thereto qualified for an exemption from deportability under section 7 of the act of September 11, 1957, *and (c) is not otherwise subject to deportation.* Denial of a waiver by the district director shall not be appealable but shall be without prejudice to renewal of an application and reconsideration in proceedings before a special inquiry officer." **(Emphasis supplied.)**

This regulation conditions the exercise of discretion on the alien being "not otherwise subject to deportation". But the appellant was otherwise deportable at the time of both entries (April 30 and May 5, 1956) under 8 U. S. C. § 1251 (a)(5) because he had failed to give required information to the Attorney General in January 1956 in compliance with 8 U. S. C. § 1305. Therefore under this regulation the Special Inquiry Officer was without authority to exercise his discretion to waive the appellant's lack of documentation.[12]

12. Although appellant's brief implies that he has applied for a waiver of documentary deficiency such is not the case. The Special

It follows that the appellant was not "otherwise admissible" under 8 U. S. C. § 1251a when he entered the country in 1956. Appellant's failure to demonstrate that he was "otherwise admissible" results in his being ineligible as a matter of law for the exercise of the Attorney General's discretion because he has failed to meet the minimal statutory prerequisites.[13]

Appellant further contends that the Attorney General has abused his discretion in not allowing him to depart voluntarily as provided in 8 U. S. C. § 1254(e).[14]

Because the appellant is subject to deportation under 8 U. S. C. § 1251(a)(5) the provisions of 8 U. S. C. § 1254(e) require that he meet the test of 8 U. S. C. § 1254(a)(5) which reads:

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend

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Inquiry Officer has stated, "No application has been made in this case for such waiver but if one were filed I would deny [it] in the exercise of administrative discretion because I do not find that there was good cause for [his] failure to present the required document, since he did not act in good faith in effecting his entry but indeed procured his entry by fraud."

13. And even had he done so the favorable exercise of discretion under § 1251a would not be assured because "the statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension [of deportation]. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met." Hintopoulos v. Shaughnessy, 353 U. S. 72, 77 (1957). See also Jay v. Boyd, 351 U. S. 345, 354 (1956); MacKay v. McAlexander, 268 F. 2d 35 (9 Cir. 1956).

14. "(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14-17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraphs (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who--

* * * * *

"(5) is deportable under paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251(a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptionally and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

As a person who is deportable under § 1251(a)(5) the appellant must meet the critical requirements (1) that he has been "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act" constituting a ground for deportation and (2) "prove that during all such period he has been and is a person of good moral character." The acts complained of are his failure in January of 1956 and January of 1957 to provide the Attorney General with his

address and other information as required by § 1305. Manifestly he cannot satisfy the requirement of having been physically present in the United States for a continuous period of not less than ten years immediately following the commission of such acts. It follows that he is similarly unable to meet the additional requirement of proving himself to have been a person of good moral character during all of such ten years.

Appellant's last application is for preexamination under 8 C. F. R. § 235a.1 which reads as follows:

> "§ 235a.1. *Application.* Preexamination may be authorized for any alien, except a citizen of Canada, Mexico, or islands adjacent to the United States, who files an application for preexamination on Form I-63 prior to December 1, 1958, intending to apply to a consular officer of the United States in Canada for an immigrant visa and who believes that he will be admissible to the United States under all the provisions of the immigration laws if in possession of an immigrant visa, or that he is prima facie eligible for a waiver of excludability under section 5 or 7 of the act of September 11, 1957; that he will be able to obtain the prompt issuance of an immigrant visa, and that he is a person of good moral character. Any alien who files Form I-63 shall be deemed to have thereby abandoned his nonimmigrant status in the United States. Form I-63 shall be submitted to the office of the Immigration and Naturalization Service having jurisdiction over the applicant's place of resident, and may be filed separately or in conjunction with a petition for non-quota or preference quota status under Part 204 or 205 of this chapter. If the applicant is under deportation proceedings, the application shall be made to the special inquiry officer during the hearing pursuant to Part 242 of this chapter. The applicant shall be notified of the decision, and, if the application is denied, of the reasons there-

for and of his right to appeal under Part 3 or 103 of this chapter."

He fails to meet the requirements of that regulation because he has not shown himself to be a person of good moral character and cannot demonstrate that he is prima facie eligible for a waiver of excludability in view of his ineligibility for that relief under 8 U. S. C. § 1251a as determined by the Special Inquiry Officer.

Under 8 C. F. R. 235a.2 the application for preexamination had to be completed before July 1, 1959. Obviously this was not done in this case.[15]

In his findings the Special Inquiry Officer made reference to the fact that appellant had been subpoenaed to appear before the Joint Legislative Committee of the State of New York on Government Operations (also known as the Watchdog Committee) on January 9, 1958 and had invoked his constitutional right under the Fifth Amendment to decline to answer on the advice of counsel. The findings also noted the appellant's appearance before a Federal Grand Jury in New York City on January 7, 1958, when he took the same action. The Special Inquiry Officer also observed that at the deportation hearings appellant's counsel asked and the appellant answered the same questions he had refused to answer before the New York State Committee. The appellant asserted that similar references, made at each stage of the proceedings by the Board of Immigration Appeals, the Attorney General and the District Judge, indicated that his refusal to answer originally resulted in his being regarded as undeserving of the consideration to which he would have otherwise been entitled had he not invoked the Fifth Amendment. The appellant contended that he was claiming no more than his constitutional right and that any derogative inference drawn therefrom in the deportation proceedings was an abuse of discretion.

15. In any event both regulations, 8 C. F. R. 235a.1 and 235a.2 were revoked on August 12, 1959. 24 F. R. 6477.

While it is true that his conduct before investigative bodies was the subject of comment, such conduct was patently not determinative of the decisions which find ample basis in this record. The comments made were not prejudicial to the appellant so as to constitute abuse of discretion.

The appellant also suggests that newspapers sensationally linked him to a meeting of various individuals at the home of Joseph Barbara in Apalachin, New York, on November 14, 1957, and that this circumstance was noticed in these proceedings to his prejudice. There is no evidence to support such an implication.

Finally, the appellant attacks the judgment of the district court because the judge said he felt "that in view of all the circumstances and the atmosphere surrounding the case the [appellant] has not sustained the burden placed upon him under the law and that the Government officials having charge of the inquiry did their full duty." He claims that the court "should have *reviewed* the record, evaluated the evidence or lack of evidence pertinent to the issue and should have reached its own conclusion as to whether the appellant was or was not entitled to the discretionary relief provided for by the Act." He failed to show that the court did less.

The right of review by the court of the action of the administrative agency in this case is limited to whether the decision of deportability was based on reasonable, substantial and probative evidence and was neither arbitrary, capricious nor violative of procedural due process. United States ex rel Brzovich v. Holton, 222 F. 2d 840, 842 (7 Cir. 1955); Fougherhouse v. Brownell, 163 F. Supp. 580, 584 (D. Ore. 1958).

The expression used by the trial judge in his opinion that he was "not unmindful of the facts of the case as expressed in the written record of the testimony and the official records as to other phases of the case contained in the various documents" after his allusion to the "hundreds of

pages of testimony and numerous exhibits 'that] have been offered in evidence", indicates that he accorded the appellant full judicial review. Our own analysis of the underlying evidence leads us to the conclusion that his order for summary judgment in favor of the respondent and dismissal of the petition for review was justified.

The Order of the District Court will be affirmed.

APPENDIX "B".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12927

RUSSELL BUFALINO,
Appellant

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, HASTIE and FORMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

April 1, 1960

APPENDIX "C".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12927.

RUSSELL BUFALINO

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

SUR PETITION FOR REHEARING

Present: GOODRICH, HASTIE and FORMAN, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

/s/ PHILLIP FORMAN

Dated: April 27, 1960

APPENDIX "D".

STATUTES AND REGULATIONS INVOLVED.

Title 8, U.S.C.

Section 1181. Admission into the United States—Documentary requirements.

(a) No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such immigrant visa of the accompanying parent, (2) is properly chargeable to the quota specified in the immigrant visa, (3) is a nonquota immigrant if specified as such in the immigrant visa, (4) is of the proper status under the quota specified in the immigrant visa, and (5) is otherwise admissible under this chapter.

Readmission after temporary departure

(b) Notwithstanding the provisions of section 1182(a) (20) of this title, in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

* * *

(June 27, 1952, c. 477, Title II, ch. 2, Section 211, 66 Stat. 181)

Section 1182. Excludable classes of aliens; non-applicability to certain aliens; waiver of requirements; parole of aliens; report to Congress; suspension of entry by President.

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • •

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(c) of this title;

• • •

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: Provided, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

• • •

(June 27, 1952, c. 477, Title II, ch. 2, Section 212, 66 Stat. 182)

Section 1251. Deportable aliens—General classes.

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * *

(5) has failed to comply with the provisions of section 1305 of this title unless he established to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 1306(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of sections 611-621 of Title 22 or has been convicted under section 1546 of Title 18;

* * *

(June 27, 1952, c. 477, Title II, ch. 5, Section 241, 66 Stat. 204)

Section 1251a. Aliens deportable for fraud or misrepresentation; adjustment of status of certain aliens; conditions; waiver of ground of inadmissibility.

The provisions of section 1251 of this title relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who

were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. After September 11, 1957, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, shall on and after September 11, 1957, be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States. (Pub. L. 85-316, Section 7, Sept. 11, 1957, 71 Stat. 640.)

Section 1254. Suspension of deportation—Adjustment of status for permanent residence; contents.

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * *

(5) is deportable under paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251(a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * *

Voluntary departure

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraphs (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral

character for at least five years immediately preceding his application for voluntary departure under this subsection.

(June 27, 1952, c. 477, Title II, ch. 5, Section 244, 66 Stat. 214.)

Section 1305. Change of address.

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. Any such alien who is temporarily absent from the United States on the first day of January following the effective date of this chapter, or on the first day of January of any succeeding year shall furnish his current address and other information as required by this section within ten days after his return. Any such alien in the United States in a lawful temporary residence status shall in like manner also notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States regardless of whether there has been any change of address. In the case of an alien for whom a parent or legal guardian is required to apply for registration, the notice required by this section shall be given by such parent or legal guardian.

(June 27, 1952, c. 477, Title II, ch. 7, Section 265, 66 Stat. 225.)

Section 1306. Penalties—Willful failure to register.

(a) Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

Failure to notify change of address

(b) Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and deported in the manner provided by Part 5 of this subchapter, unless such alien established to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(June 27, 1952, c. 477, Title II, ch. 7, Section 266, 66 Stat. 225.)

8 Code of Federal Regulations (1958 ed.).

Section 242.7a. Waiver of documents; returning residents.

Pursuant to the authority contained in section 211(b) of the act, an alien previously lawfully admitted to the United States for permanent residence who, upon return from a temporary absence of less than one year in a country or countries of the Western Hemisphere, was excludable

because of failure to have or to present a valid passport, immigrant visa, reentry permit, border crossing card, or other document required at the time of entry, may be granted a waiver of such requirement in the discretion of the district director, or in deportation proceedings in the discretion of the special inquiry officer: Provided, That such alien (a) was not otherwise excludable at the time of entry, or (b) having been otherwise excludable at the time of entry is with respect thereto qualified for an exemption from deportability under section 7 of the act of September 11, 1957, and (c) is not otherwise subject to deportation. Denial of a waiver by the district director shall not be appealable but shall be without prejudice to renewal of an application and reconsideration in proceedings before a special inquiry officer.

(23 F. R. 2787, Apr. 26, 1958.)

Section 264.1. Alien registration receipt card—

* * *

(c) Forms constituting alien registration receipt cards under the Immigration and Nationality Act. In addition to any form specifically stated elsewhere in this chapter to be an alien registration receipt card issued pursuant to section 264(d) of the Immigration and Nationality Act, the forms listed in this paragraph shall, under the conditions specified, also constitute alien registration receipt cards.

(1) Form I-151. Form I-151 shall be issued as an alien-registration receipt card and as evidence of lawful admission for permanent residence to an alien who is lawfully admitted to the United States as an immigrant with an unexpired immigrant visa; who in any manner becomes a lawful permanent resident of the United States and is registered in the United States.

* * *

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No. 254

In the Supreme Court of the United States

OCTOBER TERM, 1960

RUSSELL BUFALINO, PETITIONER

v.

JOHN W. HOLLAND, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 277 F. 2d 270.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1960. A petition for rehearing was denied April 27, 1960. The petition for a writ of certiorari

was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record supports the Attorney General's conclusion that the petitioner failed to show that noncompliance with the alien registration provisions was not willful or was reasonably excusable.

2. Whether petitioner was entitled to relief under Section 7 of the Act of September 11, 1957 which provides relief for certain entries into the country by fraud.

3. Whether there was basis for the denial of the discretionary relief of voluntary departure.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 204 (8 U.S.C. 1251) provides in part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * *

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or * * *

* * * *

Section 7 of the Act of September 11, 1957, 71 Stat. 640 (8 U.S.C. 1251a) provides:

The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided*, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or resi-

dence, or elsewhere. After the effective date of this Act, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, shall hereafter be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.

Section 244 of the Immigration and Nationality Act of 1952, 66 Stat. 214 (8 U.S.C. 1254) provides in part:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * *

(5) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241(a) as a person who has remained longer

in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a), (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately pre-

ceding his application for voluntary departure under this subsection.

STATEMENT

The petitioner was ordered deported on three charges (R. 88a): (1) entering without inspection in violation of Section 241 (a)(2) of the Immigration and Nationality Act of 1952; (2) failing to comply with the alien registration provisions in 1956 and 1957 in violation of Section 241 (a) (5) of the Act, and (3) entering when excludable by law because he did not possess a reentry permit or other valid entry document in violation of Section 241 (a) (1) of the Act (R. 47a-49a).

1. At the deportation hearing of January 2, 1958, the Special Inquiry Officer explained each of the charges to the petitioner, who said he understood them (Tr. 7-8).[1] In connection with the second charge the Officer stated in part (Tr. 7):

> * * * In other words, the law requires that every alien submit certain information, including his address, during January of each year to the Immigration and Naturalization Service, acting as the delegate of the Attorney General. Under the law a person is deportable if he fails to do that and if he does not have a good excuse.

---

[1] We have filed a certified transcript of the hearings in two volumes each separately paginated. Volume one will be referred to by the prefix "Tr."; Volume two, which contains the reopened hearings, by the volume number II and Tr. page. We have also filed three volumes of Exhibits, consecutively numbered, which will be referred to by the prefix "Ex.".

> If a person has a good reason which is excusable, he is not deportable; if he did not do it wilfully, he is not deportable. By wilful is meant he deliberately, purposely did it. In other words, a person knows he is required to do it and refuses to do it. Do you understand the second charge?
>
> A. Yes.

Also at this hearing, the petitioner's counsel obtained a continuance until January 20, 1958, in part to obtain a birth certificate, stating (Tr. 2): "Our case is based on the fact that Mr. Bufalino was born in Pittston, Pennsylvania." At the continued hearing on January 20, 1958, the petitioner's counsel requested a further continuance because the birth record previously sought had been impounded (Tr. 9-10). The continuance was denied in part as there had been no request for the issuance of a subpoena (Tr. 11), and the petitioner's counsel admittedly had all the information contained in the birth record docket (Tr. 12).

2. At the hearing, it was stipulated (Ex. 8) that the petitioner entered the United States on April 30, 1956, and May 5, 1956, each time claiming he was a citizen of the United States; that he had no valid entry document, and that he failed to notify the Attorney General of his address during January 1956 and 1957 (Ex. 8). Exhibit 20, admitted over objection, was a certified and authenticated record of the petitioner's birth in Montedoro, Italy, on September 29, 1903 (Tr. 48-49). Thereafter, at the opening of the hearing on January 22, 1958, the peti-

tioner conceded alienage (Tr. 54). Thus, the petitioner conceded two of the three charges—the charges of deportability for entry without inspection (Section 241 (a)(2)) and entry without a valid entry document (Section 241 (a)(1)). However, while admitting failure to register with the Attorney General under the charge founded on Section 241 (a)(5), the petitioner did not "concede that such failure to report was wilful" (Tr. 58). He also, as the spouse of an American citizen, applied for relief under Section 7 of the Act of 1957, pre-examination, and voluntary departure.

3. On the issue of willfulness, the petitioner claimed that (Tr. 110): "Prior to Monday of this week, I honestly and sincerely believed I was born in Pittston, Pennsylvania." He testified that since he did not know the date, he had adopted a birth date—October 29, 1903 (R. 3a; Tr. 185-186). The petitioner had given that date and Pittston as the place of birth in his social security and selective service applications (R. 5a). In his marriage license and Elks membership, he said he was born in Pittston in 1904 (Tr. 188-189). A 1947 voting registration lists the petitioner as born in Buffalo in 1905 (Tr. 191).[2] The petitioner's sisters and brother said they did not know where the petitioner was

[2] The petitioner explained the wrong date of birth on his marriage license application and Elks application by claiming—"They must have made a mistake" (Tr. 188-189). As to his voting registration from West Pittston, which indicated his birth as Buffalo, New York, on November 29, 1905, he said, "Somebody made a mistake there" (Tr. 191).

born, but claimed they had heard he was born in the United States (Tr. 19, 35-36, 42, 45).

It was shown that the petitioner had first entered the United States from Italy in December, 1903, at the age of two months, and again in January, 1906, at age 2. He was taken back to Italy in the fall of 1910 (at age 7) and returned to the United States in February, 1914 (age 11) (R. 9a-10a; Tr. 49-51).

A vocational school record of 1917 indicated the petitioner's place of birth as "Italy" (Tr. 183, Ex. 49); the petitioner's school record in Buffalo in 1914 indicated he was born in "Italy" (Tr. 183-184, Ex. 50); the Pittston school record in 1915 showed his place of birth as "Italy" (Tr. 184, Ex. 51) and the New York school record in 1910 indicated his place of birth as "Italy" (Tr. 184, Ex. 52). In September, 1944, Mr. Barbara, whom the petitioner described as a good friend (Tr. 163), in filing a report in connection with workmen's compensation as a result of an accident, listed the petitioner's nationality as "Italy" (Tr. 193, Ex. 55).

The evidence further showed that a Mary Louise Bufalino, who had worked as a clerk in the Luzerne County Court at Wilkes-Barre, Pennsylvania, since September 15, 1940, admitted she had placed on the docket of Luzerne County (Tr. 76-78) an entry purporting to show that Russell Bufalino was born October 29, 1903, in Pittston Township (Ex. 29). She claimed she merely transcribed this record from the original (Tr. 78-79) which purported to show that the birth was reported December 14, 1903 (Tr. 73).

The petitioner claimed he did not know of the existence of the Luzerne County birth record (Tr. 189-190).

The petitioner submitted 158 affidavits as to his good moral character (Tr. 245, Ex 59). On March 5, 1958, after the deportation hearing was reopened on the representation of the Immigration and Naturalization Service that fraudulent evidence had been presented, the petitioner's counsel requested the return of Exhibit 59—the good moral character affidavits—and offered to substitute 128 new affidavits (Vol. II, Tr. 2). The withdrawal request was denied, but new affidavits were accepted (Vol. II, Tr. 3). Mr. Bert R. Ardoline and Miss Rose Mitchell, notaries on the original affidavits, stated that none of the 158 affidavits had been notarized in front of the affiants except for the affidavit signed by Miss Mitchell's brother (Vol. II, Tr. 5, 12). There were new affidavits by some of the signers of original affidavits (who previously had stated they were closely associated with the petitioner) that they never had a conversation with the petitioner (Vol. II, Tr. 27-30).

4. In his application for pre-examination the petitioner listed his employment for the past five years as follows (Ex. 35):

Name & Address of Employer	Type of Work & Salary	From	To
Bonnie Stewart	Efficiency Man $200 per week	1950	1953
Penn Drape Co.	Self employed	Dec. 1953	To date
Fairfrax, Inc.	Efficiency Man $125 per week	Dec. 1953	To date

There was evidence that this information was not complete (Vol. II, Tr. 32-35, 51-52, 149, 177.)

5. The Inquiry Officer after reviewing all the evidence held (R. 84a):

> I am convinced that in all these matters, respondent knowingly and deliberately told less than the truth. His assertion that prior to these proceedings he had no knowledge of the false birth record, which had been created in his name in the Luzerne County records, is, in my view, devoid of plausibility. From my observation of respondent's demeanor and upon appraisal of all his testimony, it is my finding that his claim that prior to January 20, 1958, he had always believed that he was born in Pittston, Pennsylvania, is unworthy of credence, and was, indeed, offered by respondent in these proceedings with full knowledge of its falsity.

The Inquiry Officer held that the petitioner was not entitled to relief under the first sentence of Section 7, because the petitioner was not "otherwise admissible at the time of entry", in that he failed to possess any entry documents. He noted that while such documents could be waived at the discretion of the Attorney General, there was no request for such waiver, nor would such have been granted if requested since the petitioner's failure to obtain documentation was the result of his wilfull attempt to conceal his alienage (R. 85a-86a).

The Inquiry Officer further concluded that the petitioner was not entitled to voluntary departure both on the ground that he had not been physically

continually in the United States for ten years and had not shown himself to be of good moral character (R. 86a-87a). Although reference was made to the petitioner's claim of privilege before bodies investigating a meeting at the home of Barbara in Apalachin, New York (R. 61a),[3] the Inquiry Officer specifically noted that the record did not establish that the petitioner was a "mobster" and the findings and order were not influenced by the statements in the press (R. 88a).

The Board of Immigration Appeals thought that, before deciding whether the second charge should be upheld as well as denial of discretionary relief, the proceedings before a Senate Investigating Committee should be made a part of the record (R. 90a-91a). However, the Attorney General reversed this part of the holding and directed the Board to proceed to a final decision (R. 91a-92a). On September 2, 1958, the Board rendered its final decision and affirmed the Special Inquiry Officer's holdings (R. 100a-110a).

6. The petitioner attacked the order of deportation and the denial of discretionary relief by an action in the United States District Court for the Eastern District of Pennsylvania.

On April 8, 1959, the district court, in granting a motion for summary judgment on the record, upheld the deportation order (R. 111a-113a). This was affirmed by the third circuit on April 1, 1960.

---

[3] The petitioner did answer questions as to presence there in the immigration hearing (Tr. 221-223).

ARGUMENT

The petitioner's attack on the administrative proceedings is essentially an attempt to overturn the finding of the Special Inquiry Officer that the petitioner had proved himself not worthy of belief. If, as the hearing officer found, the petitioner did deliberately conceal the fact, known to him, that he was an alien, it follows that his failure to register could not be excused as not willful. And if the petitioner sought to give and present false evidence in the administrative hearings, that in itself establishes that he was not of good moral character to be entitled to discretionary relief. There is no reason not to accept the finding of the Special Inquiry Officer who saw and heard the petitioner, for, not only is the petitioner's testimony evasive on its face, but, as set forth in the Statement, *supra*, it was shown to be false in many particulars. There is therefore no occasion for further review by this Court.

1. There is no merit in the contention (raised for the first time in a petition for rehearing in the court of appeals) that no attention was given to the legal content of the term "willful" in the applicable statute. At the very first hearing, the Inquiry Officer explained the term willful to the petitioner.

The petitioner sought to sustain his burden of satisfying the Attorney General of the fact that his failure to register was not willful on the basis that he "believed" he was born in Pittston, Pennsylvania. He failed in that attempt, not because of any misunderstanding as to the legal standard, but because

his testimony was properly found incredible in the light of the entire proof.

2. The foregoing point, in effect, is dispositive of this case, and the petitioner so recognizes by limiting his second question involving the application of the relief provisions of Section 7 of the Act of September 11, 1957, *supra*, to the conceded charges under Sections 241 (a) (1) and 241 (a) (2), and not to Section 241 (a) (5) which was involved in paragraph 1 above. Clearly no Section 7 relief is afforded for the deportable charge of failing to register as set forth in Section 241 (a) (5). This is so, because to the extent applicable Section 7 cures only fraudulent entry under certain circumstances; it does not provide relief for acts which give rise to deportability after entry, such as the failure to register.

In any event, the petitioner has not shown himself to be entitled to any relief under Section 7. The first sentence of Section 7 provides relief from deportability in certain circumstances for fraudulent entry, provided an alien is "otherwise admissible." The petitioner claims that his lack of proper entry documents, which the Special Inquiry Officer found made petitioner "otherwise inadmissible", was part of and grew out of the fraud and that therefore the petitioner qualified for relief (Pet. Br. 10). This is fallacious. Under such a construction any fact which makes an alien "otherwise inadmissible" would be part of a fraudulent entry and hence the phrase would be meaningless. Here the petitioner entered fraudulently by stating he was a citizen. If he had told the truth—i.e. that he was an alien—he would

have been "otherwise inadmissible," for lack of entry documents.

Next, the petitioner complains that the failure to waive entry documents was "untenable" (Pet. Br. 10), since the statute forgives fraud. If this were the case, Congress could easily have inserted such a legislative waiver in the statute. The case cited by the petitioner—*Matter of Y———*, B.I.A. Interim Decision No. 975—recognizes the need for administrative waiver. In fact in that case the alien previously had an identification card. See also *Matter of D'O ——*, B.I.A. Interim Decision No. 970 and *Matter of G ——*, B.I.A. Interim Decision No. 972. Of course, the question of waiver is not properly presented on this record, because the petitioner—for his own strategic reasons—made no application for such waiver (R. 86a).[4]

3. The petitioner complains that he was improperly denied discretionary relief because (a) his previous invocation of the Fifth Amendment should not have been considered, (b) there was an improper construction of Section 244 (e) of the Act, and (c) the Special Inquiry Officer's decision was not based upon substantial probative evidence.[5] None of these arguments has merit.

---

[4] The petitioner's claim that no consideration was given to Section 212(c) of the Act (Pet. Br. 11), first raised in the petition for rehearing, is of no aid since, even assuming its applicability, it still depends on the same discretionary action of the Attorney General, which was refused.

[5] It is noted that pre-examination relief is no longer available. 24 F.R. 6477 (Pet. App. 18a). Further, if the government is correct in point 1, *supra*, relief in terms of voluntary departure is unavailable. *Caiozzo* v. *District Director*, 158 F. Supp. 872 (S.D. N.Y.).

a. Consideration of the petitioner's previous refusal to answer questions by invoking the Fifth Amendment privilege against self-incrimination was not a factor in the decision of this case. There is no indication that this influenced the original decision by the Special Inquiry Officer. See also R. 88a. The suggestion of the Board to add further evidence of this type was deemed unnecessary by the Attorney General (R. 91a-92a)—hardly ground for complaint by the petitioner—and, as the court of appeals noted (Pet. App. 19a), "such conduct was patently not determinative of the decisions which find ample basis in this record."

b. The petitioner claims Section 244 (e) of the Act, which provides for voluntary departure, is irrelevant to relief under Section 7 of the Act of September 11, 1957 (Pet. Br. 13). The petitioner asked for and was separately denied both (Tr. 114 and 244, R. 86). He also complains that to incorporate the 10-year requirement of Section 244 (a)(5) renders the 5-year requirement of good moral character of Section 244 (e) meaningless (Pet. Br. 13). But the two are not commensurate, since the 10-year period dates from the "act", which constitutes the ground for deportation, while the 5-year period dates from the "application" for voluntary departure. See the statute, *supra*, pp. 3-6.

c. The petitioner asserts that the denial of discretionary relief was not based upon substantial, probative evidence (Pet. Br. 13-14). This is not the standard to be applied to discretionary action as to

which, judicial review is extremely narrow and concerned with whether the denial was arbitrary. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72. In any event, not only was the petitioner's testimony on place of birth, and type and amount of income, not credible on this record, but other evidence was presented which effectively negated any possible claim of arbitrary discretionary action. The claim of good moral character, by producing a quantity of affidavits, all on printed forms including even the printing of the petitioner's name (see fn. 8 of the court of appeals' opinion, Pet. App. 8a) is certainly not conducive to obtaining discretionary relief, particularly when some "closely associated" affiants had only a "nodding acquaintanceship" (R. 80a).

Finally, as the court below noted in connection with the insertion of a false birth record for the petitioner's birth in the Luzerne County records—an obviously crucial issue at the outset of these hearings—(Pet. App. 11a),

> While appellant disclaims all knowledge of the falsity of the entry——who else but he had a motive to design this deception? His denial stretches credulity to the breaking point.

In the face of all this evidence, there was no arbitrary abuse in denying this petitioner discretionary relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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